

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

LUCILLE A. SCOTT,)	
)	No. CV-05-267-CI
Plaintiff,)	
)	ORDER DENYING PLAINTIFF'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	AND DIRECTING ENTRY OF
JO ANNE B. BARNHART,)	JUDGMENT FOR DEFENDANT
Commissioner of Social)	
Security,)	
)	
Defendant.)	
)	

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 11, 14) submitted for disposition without oral argument on April 17, 2006. Attorney Norman R. McNulty, Jr., represents Plaintiff; Special Assistant United States Attorney Carol A. Hoch represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 4.) After reviewing the administrative record and the briefs filed by the parties, the court **DENIES** Plaintiff's Motion for Summary Judgment and directs entry of judgment for Defendant.

Plaintiff, 62-years-old at the time of the date of last insured, completed GED requirements and had past work experience as

1 an independent bookkeeper. Plaintiff filed an application for Social
2 Security disability benefits on August 29, 2002 / October 18, 2002,
3 alleging disability as of December 2000, due to physical and mental
4 impairments. Following a denial of benefits at the initial stage
5 and on reconsideration, a hearing was held before Administrative Law
6 Judge Richard Hines (ALJ). On November 17, 2004, the ALJ denied
7 benefits; review was denied by the Appeals Council. This appeal
8 followed. Jurisdiction is appropriate pursuant to 42 U.S.C. §
9 405(g).

10 ADMINISTRATIVE DECISION

11 The ALJ concluded Plaintiff met the non-disability requirements
12 and was insured for benefits through December 2002. (Tr. at 22.)
13 Plaintiff had not engaged in substantial gainful activity and
14 suffered from severe impairments which were not described but those
15 impairments were not found to meet the Listings. (Tr. at 19.) The
16 ALJ noted Plaintiff had been treated for primary biliary cirrhosis
17 of the liver, back and hip pain, fibromyalgia, osteoarthritis,
18 colitis, menopause, arthritis of the thumb, small breast nodules,
19 and depression under control with medication. (Tr. at 22.) He
20 concluded Plaintiff's testimony was not fully credible. The ALJ
21 determined Plaintiff had the residual capacity for a wide range of
22 light and sedentary work, including her past relevant work as a
23 bookkeeper. (Tr. at 23.) The ALJ concluded Plaintiff was not
24 disabled.

25 ISSUES

26 The question presented is whether there was substantial
27 evidence to support the ALJ's decision denying benefits and, if so,
28 whether that decision was based on proper legal standards.

1 Plaintiff contends the ALJ erred when he erroneously (1) found her
2 mental impairments were not severe after rejecting the opinion of
3 the examining psychologist; and (2) rejected her testimony of
4 disabling pain without clear and convincing reasons.

5 STANDARD OF REVIEW

6 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
7 court set out the standard of review:

8 The decision of the Commissioner may be reversed only if
9 it is not supported by substantial evidence or if it is
10 based on legal error. *Tackett v. Apfel*, 180 F.3d 1094,
11 1097 (9th Cir. 1999). Substantial evidence is defined as
12 being more than a mere scintilla, but less than a
13 preponderance. *Id.* at 1098. Put another way, substantial
14 evidence is such relevant evidence as a reasonable mind
15 might accept as adequate to support a conclusion.
16 *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the
17 evidence is susceptible to more than one rational
18 interpretation, the court may not substitute its judgment
19 for that of the Commissioner. *Tackett*, 180 F.3d at 1097;
20 *Morgan v. Comm'r of Soc. Sec. Admin.* 169 F.3d 595, 599
(9th Cir. 1999).

21 The ALJ is responsible for determining credibility,
22 resolving conflicts in medical testimony, and resolving
23 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
24 Cir. 1995). The ALJ's determinations of law are reviewed
25 *de novo*, although deference is owed to a reasonable
26 construction of the applicable statutes. *McNatt v. Apfel*,
27 201 F.3d 1084, 1087 (9th Cir. 2000).

28 SEQUENTIAL PROCESS

Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
requirements necessary to establish disability:

Under the Social Security Act, individuals who are
"under a disability" are eligible to receive benefits. 42
U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
medically determinable physical or mental impairment"
which prevents one from engaging "in any substantial
gainful activity" and is expected to result in death or
last "for a continuous period of not less than 12 months."
42 U.S.C. § 423(d)(1)(A). Such an impairment must result
from "anatomical, physiological, or psychological
abnormalities which are demonstrable by medically
acceptable clinical and laboratory diagnostic techniques."

1 42 U.S.C. § 423(d)(3). The Act also provides that a
2 claimant will be eligible for benefits only if his
3 impairments "are of such severity that he is not only
4 unable to do his previous work but cannot, considering his
5 age, education and work experience, engage in any other
kind of substantial gainful work which exists in the
national economy" 42 U.S.C. § 423(d)(2)(A). Thus,
the definition of disability consists of both medical and
vocational components.

6 In evaluating whether a claimant suffers from a
7 disability, an ALJ must apply a five-step sequential
8 inquiry addressing both components of the definition,
9 until a question is answered affirmatively or negatively
10 in such a way that an ultimate determination can be made.
20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
11 claimant bears the burden of proving that [s]he is
12 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
1999). This requires the presentation of "complete and
detailed objective medical reports of h[is] condition from
licensed medical professionals." *Id.* (citing 20 C.F.R. §§
404.1512(a)-(b), 404.1513(d)).

13 ANALYSIS

14 1. Step Two Mental Impairment

15 Plaintiff contends the ALJ erred when he concluded her mental
16 impairments were not severe in light of the diagnosis by Dr. Toews
17 that Plaintiff suffered from a pain disorder associated with both
18 psychological features and general medical condition. (Tr. at 347.)
19 Defendant responds the ALJ was correct in relying on Dr. Toews'
20 findings which were based on his independent clinical examination,
21 that any mental impairment imposed only mild restrictions.

22 At step two of the sequential process, the ALJ must conclude
23 whether Plaintiff suffers from a "severe" impairment, one which has
24 more than a slight effect on the claimant's ability to work. To
25 satisfy step two's requirement of a severe impairment, the claimant
26 must prove the existence of a physical or mental impairment by
27 providing medical evidence consisting of signs, symptoms, and
28 laboratory findings; the claimant's own statement of symptoms alone

1 will not suffice. 20 C.F.R. § 416.908. The effects of all symptoms
2 must be evaluated on the basis of a medically determinable
3 impairment which can be shown to be the cause of the symptoms. 20
4 C.F.R. § 416.929. Once medical evidence of an underlying impairment
5 has been shown, medical findings are not required to support the
6 alleged severity of pain. *Bunnell v. Sullivan*, 947 F.2d 341, 345
7 (9th Cir. 1991). However, an overly stringent application of the
8 severity requirement violates the statute by denying benefits to
9 claimants who do meet the statutory definition of disabled. *Corrao*
10 *v. Shalala*, 20 F.3d 943, 949 (9th Cir. 1994). Thus, the
11 Commissioner has passed regulations which guide dismissal of claims
12 at step two. Those regulations state an impairment may be found to
13 be not severe *only* when evidence establishes a "slight abnormality"
14 on an individual's ability to work. *Yuckert v. Bowen*, 841 F.2d 303,
15 306 (9th Cir. 1988) (citing Social Security Ruling 85-28). The ALJ
16 must consider the combined effect of all of the claimant's
17 impairments on the ability to function, without regard to whether
18 each alone was sufficiently severe. See 42 U.S.C. § 423(d)(2)(B)
19 (Supp. III 1991). The step two inquiry is a *de minimis* screening
20 device to dispose of groundless or frivolous claims. *Bowen v.*
21 *Yuckert*, 482 U.S. 137, 153-154.

22 Following a referral by the agency and a statement during the
23 administrative hearing by the medical consultant that Plaintiff
24 suffered from somatization (Tr. at 358),¹ Dr. Toews conducted a
25

26 ¹The medical consultant, Dr. William Spence, referred to the
27 fibromyalgia diagnosis as one of somatization, which he defined as
28 generalized complaints of pain. (Tr. at 380.)

1 mental status exam and administered the MMPI-2. Dr. Toews noted
2 Plaintiff reported reasonably good health until 1999-2000 when she
3 began to suffer from chronic pain and fatigue due to osteoarthritis,
4 fibromyalgia, and primary biliary cirrhosis. (Tr. at 344.) Dr.
5 Toews noted Plaintiff was properly groomed, with normal speech,
6 attention, concentration, judgment and insight, and exhibited a
7 pleasant mood. (Tr. at 346.) MMPI-2 test results were valid with
8 an elevated K scale indicative of an individual who "resists
9 psychological explanations for difficulties, and tends to be
10 conventional and conforming," as well as well-rounded, social,
11 resourceful and independent. (Tr. at 346-347.) Dr. Toews noted
12 Plaintiff's profile was consistent with somatization tendencies with
13 no indication of depression or anxiety. (Tr. at 347.) Diagnoses
14 included (1) somatization disorder, (2) pain disorder associated
15 with both psychological features and general medical condition, (3)
16 histrionic personality traits, and (4) a global assessment of
17 functioning score of 62, indicative of mild limitations. DIAGNOSTIC
18 AND STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH EDITION (DSM-IV), at 32
19 (1995). (Tr. at 347.)

20 A review of Plaintiff's medical record discloses medication
21 treatment (Zoloft, Prozac, Wellbutrin) at different times for
22 stress, secondary to situational financial pressures and a family
23 tragedy. (Tr. at 121, 132, 306, 334.) However, there were no
24 recommendations by treating physicians that Plaintiff seek mental
25 health counseling or psychiatric treatment. In May 2004, medical
26 records noted Plaintiff was not suffering from anxiety or
27 depression. (Tr. at 337.) Thus, there is no objective medical
28 evidence to support a finding of a severe mental impairment or one

1 which would result in more than minimal limitations encompassed in
2 a GAF assessment of 62. The ALJ did not err when he concluded
3 Plaintiff did not suffer from a severe mental impairment.

4 2. Credibility

5 Plaintiff contends the ALJ's decision is not supported by
6 substantial evidence and is based on legal error. Specifically, she
7 contends the ALJ did not provide clear and convincing reasons for
8 rejecting her testimony that she suffered from debilitating pain and
9 fatigue. It is undisputed Plaintiff has been diagnosed with
10 degenerative osteoarthritis in the left thumb (Tr. at 177), right
11 hip (Tr. at 124), bursitis and chondromalacia of the patella with
12 early osteoarthritis (Tr. at 174-75), moderately severe facet
13 arthropathy causing mechanical low back pain (Tr. at 249), primary
14 biliary cirrhosis (Tr. at 202), and a suggestion of chronic
15 hepatitis (Tr. at 154). Thus, Plaintiff argues there is sufficient
16 objective medical signs and laboratory findings to support
17 complaints of pain and fatigue. Defendant responds the ALJ properly
18 rejected Plaintiff's testimony, noting the ALJ relied on evidence
19 that no functional limitations were assigned by treating physicians,
20 Plaintiff engaged in "robust and self reliant" daily activities, and
21 that she had improved with physical therapy, but had voluntarily
22 discontinued such treatment.

23 In deciding whether to admit a claimant's subjective symptom
24 testimony, the ALJ must engage in a two-step analysis. *Smolen v.*
25 *Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996). Under the first step,
26 see *Cotton v. Bowen*, 799 F.2d 1403, 1405 (9th Cir. 1986), the
27 claimant must produce objective medical evidence of underlying
28 "impairment," and must show that the impairment, or a combination of

1 impairments, "could reasonably be expected to produce pain or other
2 symptoms." *Id.* at 1281-82. If this test is satisfied, and if there
3 is no evidence of malingering, then the ALJ, under the second step,
4 may reject the claimant's testimony about severity of symptoms with
5 "specific findings stating clear and convincing reasons for doing
6 so." *Id.* at 1284. The ALJ may consider the following factors when
7 weighing the claimant's credibility: "[claimant's] reputation for
8 truthfulness, inconsistencies either in [claimant's] testimony or
9 between [his/her] testimony and [his/her] conduct, [claimant's]
10 daily activities, [his/her] work record, and testimony from
11 physicians and third parties concerning the nature, severity, and
12 effect of the symptoms of which [claimant] complains." *Light v.*
13 *Soc. Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997). If the ALJ's
14 credibility finding is supported by substantial evidence in the
15 record, the court may not engage in second-guessing. *See Morgan v.*
16 *Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 600 (9th Cir. 1999). If
17 a reason given by the ALJ is not supported by the evidence, the
18 ALJ's decision may be supported under a harmless error standard.
19 *Curry v. Sullivan*, 925 F.2d 1127, 1131 (9th Cir. 1990) (applying the
20 harmless error standard); *Booz v. Sec'y of Health and Human Serv.*,
21 734 F.2d 1378, 1380 (9th Cir. 1984) (same). Here, there is no
22 evidence of malingering; thus, the appropriate standard is clear and
23 convincing reasons.

24 The ALJ found:

25 And the claimant's *actual* treatment records (November 2003
26 to June 2004) show that despite her complaints of diffuse
27 aches and pain, she has repeatedly had normal physical and
28 range of motion examinations.

. . .

1 More importantly, despite her complaints of depression,
2 she reported a variety of activities of daily living
3 including taking care of the household chores, shopping,
4 planning and preparing meals, and visiting with numerous
5 friends whom she saw regularly, and doing handicrafts.

6 The undersigned also notes that there has been no opinion
7 evidence endorsing disability, but that there has been
8 opinion evidence endorsing light and sedentary level work
9 capacities. And there has been opinion evidence that has
10 also questioned her diagnosis of fibromyalgia, and even by
11 her own reports, exercising does help. A review of the
12 claimant's various medical condition [sic] with medical
13 expert at hearing revealed that indications of
14 osteoarthritis are consistent with the natural age process
15 of the lumbar spine with no radiculopathy, which the
16 claimant has repeatedly denied. As for indications of
17 arthritis of the thumb, this pertains to her non-dominant
18 hand, and at hearing, she reported that she continued to
19 sew and use her computer. Similarly, since being treated
20 cirrhosis of the liver, there has been no further
21 indication that this has been an active impairment.

22 (Tr. at 20.) The ALJ's reasons can be summarized as follows: no
23 opinion by a treating physician that she was disabled; a
24 questionable fibromyalgia diagnosis and no evidence cirrhosis was an
25 active impairment; no radiculopathy associated with her spinal
26 condition and normal range of motion studies; and daily activities
27 inconsistent with disability.

28 In September 2000, Dr. Shaffer recommended Plaintiff cut back
her work hours to half time because her fibromyalgia was not fully
controlled due to stress. (Tr. at 131, 132.) Plaintiff was then
tested for liver disease and found to be suffering from cirrhosis.
(Tr. at 135.) Plaintiff reported her fibromyalgia was improved in
November with Darvocet. It was recommended Plaintiff start an
exercise program. (Tr. at 137.) In December, notes indicate
Plaintiff's depression was controlled with Buspar. (Tr. at 138.)

In January 2001, medical notes indicate Plaintiff's complaints
of gastroesophageal reflux and diarrhea were consistent with primary

1 biliary cirrhosis, as were the symptoms underlying the diagnosis of
2 fibromyalgia. (Tr. at 281.) In May 2002, Plaintiff was evaluated
3 for cirrhosis and it was found to be mild. (Tr. at 159, 187.) In
4 August 2002, Plaintiff was treated for left knee pain; physical
5 therapy was recommended and Vioxx prescribed. (Tr. at 175.) In
6 December 2002, Dr. Carraher concluded Plaintiff could perform
7 sedentary work, after finding the diffuse pain she complained about
8 was more allodonia (pain felt everywhere as opposed to trigger
9 points common to fibromyalgia) and somatoform pain disorder than
10 fibromyalgia. (Tr. at 191, 380.) Dr. Carraher noted normal range
11 of motion of elbows, hips, knees and ankles; he was unable to
12 examine her shoulders due to diffuse pain, but muscle strength and
13 sensation in the upper extremities was otherwise normal. (Tr. at
14 191.) A residual capacity assessment in March 2003 concluded
15 Plaintiff could perform light work, relevant to establishing
16 disability as of Plaintiff's alleged date of last insured, December
17 31, 2002. Additionally, as noted in this summary, there was only
18 one medical record for treatment submitted between November 2000 and
19 May 2002. (Tr. at 201.) The ALJ legitimately may consider
20 discrepancies between a claimant's alleged limitations and the
21 objective medical evidence. *Smolen v. Chater*, 80 F.3d 1273, 1284
22 (9th Cir. 1996).

23 The ALJ also relied on Plaintiff's report of daily activities.
24 She attends water aerobics classes which help control the pain
25 complaints. (Tr. at 377.) She walks the dog, fixes meals, washes
26 dishes, takes care of personal hygiene, and sews. (Tr. at 378.)
27 Plaintiff reported to Dr. Toews the following:

28 Ms. Scott stated she is fully independent for basic self-

1 case and that she has a full complement of independent
2 living skills. She retains the ability to drive,
3 understands the rudiments of budgeting and is able to
4 balance a checkbook. . . . She plans and prepares meals.
5 She stated she has numerous friends she sees on a regular
6 basis and enjoys visiting and entertaining. She has no
7 difficulty leaving the house for leisure and/or
8 recreational activities. She enjoys a wide range of
9 handicrafts. She does some oil painting and stained glass
10 work, stated she is artistically inclined and likes trying
11 new things. She does some gardening. A typical day
12 begins between 0715 and 0730 hours. She tends to personal
13 hygiene, grooming, and has breakfast. She does water
14 aerobics, returns home to rest. She uses ice on sore
15 muscles. She does dishes from the previous evening and
16 rests in the afternoon. She usually retires between 2130-
17 22:00. She sleeps 5-6 hours. Sleep is disturbed by pain,
18 and she does not feel rested on awakening.

19 (Tr. at 346.)

20 Plaintiff's report of activities as described to Dr. Toews and
21 noted by the ALJ is not consistent with disability, but more
22 consistent with the sedentary exertional level associated with her
23 past relevant work as a bookkeeper. The ALJ's reasons for rejecting
24 her testimony were clear, cogent, and convincing and supported by
25 the record; there was no error. Based on a residual capacity for
26 sedentary work, the vocational expert testified Plaintiff could
27 perform past relevant work as a bookkeeper as she performed it.

28 (Tr. at 392.) Accordingly,

IT IS ORDERED:

1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 11**) is
DENIED.

2. Defendant's Motion for Summary Judgment (**Ct. Rec. 14**) is
GRANTED. Plaintiff's Complaint and claims are **DISMISSED WITH**
PREJUDICE.

3. The District Court Executive is directed to file this
Order and provide a copy to counsel for Plaintiff and Defendant.

Judgment shall be entered for Defendant and the file shall be
CLOSED.

DATED May 19, 2006.

S/ CYNTHIA IMBROGNO
UNITED STATES MAGISTRATE JUDGE